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No. 08-1479

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

PFIZER, INC.,

Petitioner,

v.

JAMES D. DOTSON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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STATUTES INVOLVED IN THE CASE

The statutes involved in this case are found in the Family and Medical Leave Act ("FMLA"), 29 U.S.C. § 2601, *et seq.* In addition to the statutes cited by petitioner, two other statutes are at issue. The first statute is 29 U.S.C. §§ 2612(c)-(d)(2)(A), which states:

> (c) Unpaid leave permitted
>
> Except as provide in subsection (d) of this section, leave granted under subsection (a) may consist of unpaid leave. . . .
>
> (d) Relationship to paid leave
>
> . . . .
>
> (2) Substitution of paid leave
>
> (A) In general
>
> An eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, or family leave of the employee for leave provided under subparagraph . . . (B) . . . of subsection (a)(1) of this section for any part of the 12-week period of such leave under such subsection.

The second statute involved in this case is 29 U.S.C. § 2612(e)(1), which provides:

> (e) Foreseeable leave
>
> (1) Requirement of notice
>
> In any case in which the necessity for leave under subparagraph . . . (B) of subsection (a)(1) of this section is foreseeable based on an expected birth or placement, the employee shall provide the employer with not less than 30 days' notice, before the date the leave is to begin, of the employee's intention to take leave under such subparagraph, except that if the date of the birth or placement requires leave to begin in less than 30 days, the employee shall provide such notice as is practicable.

STATEMENT OF THE CASE

I. Introduction

Respondent James Dotson brought this action after petitioner fired him in retaliation for taking leave protected by the FMLA to adopt a child from a Russian orphanage. Following a lengthy trial, the jury found that Petitioner Pfizer, Inc. ("petitioner" or "Pfizer") violated the FMLA by firing Dotson in retaliation for taking FMLA-protected leave to adopt his child. The Fourth Circuit correctly affirmed the District Court's denial of petitioner's motion for JMOL on Dotson's claim of retaliation.

This case presents no question of federal import nor does it arise from a split in circuit authority. Despite petitioner's arguments to the contrary, its decision makers had ample notice that Dotson's leave was protected by the FMLA. Indeed, petitioner acknowledges that it was advised of Dotson's plan to adopt and his need for adoption-related leave. Petition for Certiorari ("Cert. Pet.") at 6-7. It is also undisputed that petitioner's decision makers knew Dotson had taken an adoption-related leave when they decided to terminate his employment. *See* Cert. Pet. at 3-4 ("the decision makers . . . knew . . . that Dotson had used his . . . paid time off to take two trips to Russia to complete the adoption"). Inexplicably, petitioner claims that Dotson failure to expressly invoke the FMLA or formally apply for FMLA leave removed him from under the Act's protection against retaliation. This position is not supported by statute, regulation, or case law.

At trial, Dotson proved that the decision makers who ordered his termination were motivated by retaliatory animus and that petitioner's proffered reason for terminating Dotson was a pretext for discrimination. It is clear that the decision makers were aware of Dotson's adoption-related leave even if petitioner failed to properly designate the leave as protected. Appropriately, the jury rejected petitioner's proffered explanation of its decision to terminate Dotson and returned a verdict in favor of Dotson that petitioner unlawfully interfered with Dotson's FMLA rights and fired him in retaliation for taking adoption-related leave. JA 3029-30.[1]

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1. References to "JA" are to the Joint Appendix filed by the parties in the Fourth Circuit on January 14, 2008.

II. Background

A. Dotson's employment with petitioner.

Dotson began his career with petitioner in 1988 and rose rapidly through its corporate ranks. JA 910, 913-21, 1979, 2754-58. Dotson rose from an entry-level sales position to District Manager in 1991; Director of Management Training and Development in 1997; Regional Manager in 1998; Institutional Healthcare Account Manager ("IHAM") within petitioner's National Healthcare Organization ("NHO") in 2002; and Regional Account Manager ("RAM") in 2003.[2] JA 913-21, 927, 939-40, 2754-58. Dotson excelled while employed by Pfizer. JA 912-14, 916, 920-25, 931-39, 2754-58. Indeed, Dotson's performance resulted in national sales awards and numerous letters of commendation from both petitioner and its customers. JA 912-14, 916, 920-25, 931-39, 952-60, 962-63, 2660, 2662-65, 2669-70, 2754-58.

Petitioner attempts to portray Dotson's 2002 assignment to the newly created IHAM position as a demotion. *See* Cert. Pet. at 6. However, Dotson was placed in one of only two pilot positions nationwide, suffered no reduction in compensation, and received nothing to indicate deficiencies in his job performance. JA 940-41. In fact, until his unlawful termination, Dotson was never disciplined during his employment. JA 912, 2754-58. As an IHAM, Dotson again excelled. JA 941-42, 952-60, 962-63, 2660, 2662-65, 2669-70.

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2. His compensation kept pace, rising to more than $232,000.00 at the time of his wrongful termination. JA 2626R-26S, 2776-77, 2995-97.

In June 2003, petitioner phased out the IHAM program and Dotson was reassigned to a position as a RAM. JA 962, 966-71, 965, 969, 2669, 2744-45, 2754-58. As part of the transition, Dotson began reporting to Managed Market Manager Chris Kennedy, who in turn reported to Regional Manager Patrick McElerney. JA 967-68, 2190, 2350.

B. Dotson's decision to adopt.

Approximately four months before Kennedy became his supervisor, Dotson and his wife began working with the America World Adoption Association ("AWAA") to adopt a child from Russia. JA 972-73, 983-84. Dotson informed petitioner of his plans in February 2003 and kept petitioner fully apprised throughout each stage of the time-consuming process. JA 975, 981-86, 995-96, 1008-09, 1046-50, 1084-86, 1210-11, 1618-21, 2218, 2633, 2645, 2716, 2801. Dotson also contacted petitioner's third-party benefits contractor, HR Connect, to inquire about adoption benefits. JA 974-75, 2801-02

On August 27, 2003, the Dotsons learned of their selection to adopt a baby girl and that they would need to make two trips to Russia to complete the adoption. JA 725, 982-83, 999-1000, 1004, 1008, 1021, 1037-38, 1404. Dotson informed petitioner about the two trips, as well as other adoption-related absences that he would be required to take, before traveling to Russia. JA 981-93, 1008, 1038, 1084-86, 1370-71, 1459, 1615-20, 2218. Dotson's leave was approved by petitioner but petitioner never properly designated it as FMLA-protected leave. JA 1048-50, 1370-71, 1 59. Dotson attempted to ascertain his leave options but was erroneously informed

by one of petitioner's HR Representatives that he would have to "burn up" all of his vacation leave before his right to FMLA benefits would "kick in."[3] JA 1049-50. Based on this erroneous information, Dotson never requested FMLA leave.[4] JA 1049-50, 1211, 1364. Instead, Dotson took paid vacation to travel to Russia for the adoption. According to Dotson, "that is what I was told I had to do." JA 1211.

Despite petitioner's knowledge of Dotson's pending adoption and his need for leave, petitioner never notified him of his FMLA rights, suggested that he apply for FMLA leave, or otherwise inquired to determine if the leave should be designated as FMLA-protected. JA 1048-51. It is undisputed that petitioner never presented Dotson with the option of taking unpaid leave in lieu of paid vacation for the adoption. JA 1211.

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3. Specifically, Dotson contacted Amy Burnell, an HR Representative in Petitioner's Mid-Atlantic region. JA 1049-51. Burnell was not Dotson's regional HR representative; however, Dotson had previously worked with Burnell and was friends with Burnell. JA 1049, 1051, 1313. Dotson felt more comfortable speaking with Burnell because he was new to the Southeast Region and because he did not know the HR specialist in the Southeast Region. JA 1050-51.

4. At trial, Burnell admitted informing Dotson he would have to use his vacation first, but she denied telling him that the FMLA would only apply thereafter. JA 2239-40. Burnell did not make a record of Dotson's call despite routinely documenting such calls from employees within her region. JA 2240. Obviously, the jury was free to reject Burnell's contradictory testimony and believe Dotson's testimony.

C. Hostility of Dotson's Supervisors.

Kennedy and McElerney were outwardly hostile towards Dotson throughout the adoption process. For example, Kennedy became annoyed when Dotson asked Kennedy to help by filling out paperwork necessary for the adoption. JA 974-75, 977-81, 2803. Kennedy and McElerney consistently harangued Dotson over work assignments, missed meetings and deadlines, tasks purportedly not completed in a timely manner, and an alleged failure to focus on new accounts. JA 986, 1046-48, 1051-56, 1084-88, 1090-92, 1109-14, 1129-30, 1214-15, 1364-65, 1628-29, 1633-34, 1643-44, 1648-49, 1655, 1657-59, 1683-88, 1692-93, 1698-99, 1701-06, 1760-64, 1772-73, 1778-81, 1787-90, 2213-15, 2226-29, 2628-30, 2642, 2652-55, 2667, 2714-16, 2719-22, 2724-25, 2791-2800.

Kennedy grew so intolerant and suspicious of Dotson's adoption-related absences that he called Progress Energy (Dotson's electric utility) and impersonated Dotson in an effort to determine if Dotson had, as claimed, filed a late report due to a power outage caused by Hurricane Isabel. JA 1658-64, 1774-80, 2719-22. Kennedy perjured himself on the stand in an effort to conceal this deception. *Compare* JA 1662-64, *with* JA 2044-45, 2048-51, 2063-64, Tr. Ex. 140 (reprinted in the Appendix to this Response ("Resp. App.") at 1a).

Kennedy's hostility towards the adoption is perhaps most evident from his October 23, 2003, response to an email from Dotson during his second trip to Russia. Dotson wrote that he and his wife had just become "the proud parents of a little girl," that she was sick and hospitalized, and that his return to work might be

delayed. JA 1683-86, 2652, 2716. Instead of offering congratulations or showing concern, Kennedy expressed irritation toward Dotson's travel delays, hounded him about work, and ordered him to come back for a meeting in early November. JA 2652, 2716. Moreover, five days after Dotson returned from his second trip to Russia, Kennedy ordered Dotson to attend an out-of-town client dinner despite Dotson's objection and request to stay home with his newly adopted child who was still seriously ill. JA 1688-89, 1787, 2643-44. Even petitioner has acknowledged animosity between Kennedy and Dotson. *See* Petitioner's Appellate Brief at 9.

D. Dotson's Donation of Antibiotics to the Russian Orphanage.

Dotson and his wife learned from AWAA that adoptive parents customarily bring gifts, such as clothing or medical supplies, to an orphanage when adopting a child. JA 755-56, 1009, 1065, 1236-37, 1404. These supplies are needed because of the lack of resources available to the orphanages. JA 755-56, 1009-11, 1065, 1404. Adoptions are not conditioned in any way on such gifts. JA 1010, 1014, 1368, 1370. A Russian court granted Dotson and his wife custody of the child, not the orphanage. JA 1010, 1014, 1368, 1370.

Dotson believed that he was in a unique position to offer much-needed medical supplies to the orphanage. JA 1010-11, 1065-66, 2814. Accordingly, Dotson requested samples (referred to by petitioner as "starters") of the antibiotic Zithromax that were close to their expiration date (and would otherwise have been destroyed) to donate. JA 1012. Dotson thought that he

was permitted to receive starters as an NHO employee because (1) petitioner never told or trained him otherwise, (2) petitioner sent him 17 unsolicited cases of Viagra starters after he began working in NHO, (3) his laptop still had starter tracking software after he began working at NHO, and (4) petitioner reimbursed him for a starter storage unit for over eight months after he began at NHO. JA 946-51, 1014, 1017-18, 1027-29, 1030-33, 1059-60, 1115-16, 1133, 1271-72, 1348-49, 1389-93, 2103, 2105, 2674-75, 2759, 2798.

Dotson did not hide his intention to donate Zithromax. JA 1385. He did not believe that anyone, including John Lalley, his NHO area manager until June 2003, would have a problem with him doing so. JA 1390. Moreover, Dotson testified that he would not have made the donation or obtained the starters if he had any indication that petitioner would have opposed him doing so. JA 1391.

On September 4, 2003, a Pfizer employee named Bridget Jones provided Dotson with a case of Zithromax. JA 1016-20, 1040, 1489-90. Jones successfully entered the transaction into starter tracking software on her computer the same day. JA 1483, 1500. Jones' computer did not reject or flag the transfer to Dotson. JA 1499-1500. Dotson tried to document the transaction himself and when his tracking software did not function properly, he immediately contacted petitioner's Help Desk. JA 1027-28, 1030-33. Dotson was informed that his computer was not programmed to document transfers. JA 1030. Dotson also mentioned the transfer to Kennedy, who said nothing. JA 1017-18, 1030-33, 1319. Jones was never disciplined for the transfer and did not perceive it to violate policy. JA 1497, 1507, 1890-91, 2113-14.

On September 8, 2003, while meeting with Kennedy and other coworkers, Dotson received word that he would need to travel to Russia on September 21, 2003, for the adoption. JA 1020-21, 1036. Dotson shared the good news and his plan to donate Zithromax to the orphanage. JA 1020, 1022-24, 1411-17, 1458-59, 1808-10. Kennedy was outwardly irritated by the disruption and consequent discussions of the adoption. JA 1022-24. However, neither Kennedy nor anyone else who was present communicated any problem or perceived policy violation associated with Dotson's plan to donate Zithromax. JA 1022-24, 1032-34, 1411-17, 1458-59, 1808-10. In fact, one co-worker actually told Kennedy that she "was very excited that Jim was going to be able to take samples over to Russia." JA 1417. Kennedy did not respond in any way that would suggest that the donation would violate company policy. JA 1417.

Before leaving for Russia, Dotson twice explained to Kennedy that the starter tracking software installed on his computer was not functioning, asked Kennedy to manually record his receipt of Zithromax in petitioner's tracking system, and instructed Kennedy how to do so. JA 1024, 1027-28, 1030-33. Dotson testified that Kennedy did not tell him to contact petitioner's Help Desk, Starter Administration, or any other division of petitioner.[5] JA 1032-33. Although Kennedy knew that

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5. Kennedy testified that he told Dotson to contact "Sample Compliance"; however, there is no such department, and viewing the evidence in a light most favorable to Dotson, the jury presumably did not believe Kennedy's testimony. JA 1624-25, 3029-30.

Dotson was leaving for Russia in a matter of days, he never objected to the Zithromax transfer or donation. JA 1032-33, 1623.

From September 15 to September 17, 2003, Dotson attended an NHO conference in Florida with Kennedy and McElerney. JA 2224. Before the conference, Kennedy told McElerney that Dotson intended to donate Zithromax to the orphanage. JA 1033, 1328-29, 2220-21, 2224-26, 2231-32. McElerney, however, ***never*** spoke to Dotson about the starters, ***never*** advised Dotson that he was not permitted to receive or handle starters, and ***never*** advised Dotson that donating the starters would violate policy. JA 1033-34, 2224-26, 2231-32. Likewise, before Dotson left for Russia, Kennedy ***never*** advised Dotson that he was not permitted to receive or handle starters, ***never*** instructed Dotson to return Zithromax, ***never*** instructed Dotson that his donation would violate policy, and ***never*** reported Dotson's receipt of the starters to petitioner. JA 1017-18, 1032-33, 1626-27, 1707-08.

McElerney testified that he thought there was a violation of starter policy the minute that Dotson came into possession of Zithromax. JA 2231. However, neither McElerney nor Kennedy reported Dotson's alleged violation of starter policy ***before*** Dotson left for Russia. JA 1033-34, 1626-27, 2231. Instead, they waited until ***after*** Dotson left for Russia, and thus too late to avoid committing the alleged violation, to report the alleged policy violation. JA 2203. Had Kennedy or McElerney taken steps to prevent Dotson's alleged violation before his trip to Russia, Dotson would not have been terminated for having possessed the starters. JA 2374.

E. Dotson's Termination.

Shortly after Dotson's first trip to Russia, Kennedy and McElerney met with him to evaluate his performance. JA 1052-56. During this meeting, Dotson's supervisors raised concerns – for the first time – about the donation to the orphanage. JA 1053-55, 2203.

On October 13, 2003, Dotson left for his second trip to Russia. While en route to the airport, Dotson called Ann Hodges, his Regional HR Manager, to discuss his performance review. JA 1058-59, 1082. Hodges instead changed the subject and expressed her concern about Dotson's donation to the orphanage. JA 1059, 1082, 1197, 2092, 2151-53. Hodges did not provide Dotson with a fair opportunity to explain his position. JA 1056, 2128-29. Dotson immediately offered to retrieve Zithromax from the orphanage but was instructed not to do so. JA 1056, 1060, 1062, 1837, 2128-29.

On November 11, 2003, just over two weeks after Dotson returned home with his new daughter, Dotson was informed that he was being fired for violating petitioner's starter policy. JA 1120, 1123-27, 1130-31. Dotson was told that NHO personnel were prohibited from possessing starters and that his donation created the appearance of a *quid pro quo* and put the company at risk. JA 1123-27, 1130-32, 2132, 2739, 2743. The decision to terminate Dotson was reached by a "consensus group" comprised of McElerney; Hodges; Steve Harper, McElerney's supervisor and petitioner's NHO Vice President; Carl Wilbanks, Harper's supervisor and petitioner's Senior Vice President of the Healthcare Cluster; Dawn Rodgers, Hodges' supervisor

and petitioner's Senior Director of Human Resources; and Kristi Kienzle, a member of petitioner's Human Resources Department. JA 2085-87, 2261-62, 2352.

In reaching its decision, the consensus group relied exclusively upon information provided by Kennedy and McElerney;[6] never provided Dotson with an opportunity to explain his side of the story; and performed no independent investigation into Dotson's training on the starter policy for NHO employees. JA 1082, 1124, 1135-42, 1194-97, 2075-87, 2090-93, 2097, 2099-2102, 2114-19, 2140-44, 2151-54, 2163-67, 2316-17, 2328-2330, 2373-74, 2401-02, 2425, 2628-29, 2647, 2649-51, 2653-55, 2714-15, 2721-22, 2729-36, 2760-64, 2801-02, 2907-2911. Indeed, even before Hodges' one conversation with Dotson, on October 13, 2003, she stated in an email that there was "no doubt in her mind that Dotson should have known" he was committing a policy violation. JA 2101-03, 2740-41.

F. Evidence of Pretext.

The handling and use of starters is heavily regulated by the FDA by the Prescription Drug Marketing Act ("PDMA"), 21 U.S.C. § 353, *et seq.* JA 1838, 1851, 2656-57. To insure compliance with the PDMA, petitioner has distributed detailed and exhaustive policies and procedures for its employees to follow. JA 2656-59, 2684-2709, 2912-71. The policies prohibit transferring starters

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6. To ensure that Dotson would have no chance to defend himself, Kennedy and McElerney had prohibited him from communicating with any higher-level manager without going through them. JA 968, 1048, 1385.

to someone who lacks the authority to possess them. JA 1889-90, 1894-95, 2112. Petitioner requires any employee who learns of a starter violation to report the violation immediately. JA 1423, 2450-51, 2658-60. Failure to report or otherwise prevent a known violation ***is itself a violation*** of petitioner's policies. JA 2385-86, 2658-60.

Petitioner's policies, however, do ***not*** prohibit NHO employees from possessing or distributing starters. JA 946-48, 1060, 1093-94, 1842-43, 2465-66, 2656-59, 2684-2709, 2912-71. There is ***no written policy*** that addresses NHO personnel handling starters. JA 946-48, 1060, 1093-94, 1842-43, 2656-59, 2684-2709, 2912-71. Petitioner does not train NHO personnel on any such policy and Dotson never received any training from petitioner regarding the handling of starters either before or after joining NHO. JA 947-48, 1842-43, 2103, 2105.

With the exception of consensus group members, none of petitioner's employees were aware of the starter prohibition used to justify Dotson's termination. None of Dotson's NHO colleagues were aware of a policy prohibiting NHO employees from handling starters. JA 1415-17, 1451-53, 1458-59, 1497, 1507, 1539-40, 1802-05, 1809-10. Even NHO's Regional Manager had "no idea what [petitioner's] policy would be" regarding Dotson's receipt of starters while employed within NHO. JA 2479. Nevertheless, Kennedy, McElerney, and other consensus group members testified that the policy was just "known" to exist. JA 1627, 2106-08, 2118, 2122-23, 2204, 2219, 2399-2400, 2438, 2442-43, 2451-52, 2470. Curiously, though both Kennedy and McElerney supposedly knew of this unwritten policy and of Dotson's plan to donate the Zithromax, neither made any attempt to report or otherwise prevent the "violation"

before Dotson left for Russia. JA 1033, 1624-26, 1707-08, 2225-26, 2231-32.

Significantly, Dotson was the only employee disciplined for his part in the alleged violation of the starter policy. JA 1497, 1507, 1543, 1577-78, 1890-91, 1894-97, 2109-14. Despite their failure to prevent or timely report Dotson's alleged policy violation, neither Kennedy nor McElerney were disciplined in any way. JA 2114, 2281, 2386, 2395. Nevertheless, Harper, a consensus group member, admitted that McElerney's and Kennedy's actions ***also contributed to the appearance of a quid pro quo*** and therefore violated petitioner's policy. JA 2386.

Even though Jones transferred the starters to Dotson, she was not disciplined for her part in the alleged violation. JA 1497, 1507, 1890-91, 2109-14. The same is true for Ashley Stalker, who transferred other starters to Dotson. JA 2109-14. Put simply, even though petitioner claimed that Dotson's actions were a serious breach of its policies, it failed to take any action against anyone else who was involved in, had knowledge of, or failed to report the alleged violation.

In fact, under the PDMA, petitioner itself is required to report starter violations to the FDA within five days of discovery. JA 1839. Failure to do so actually can put the company at risk. JA 1946-47, 2656-57. Petitioner, however, did not report Dotson's alleged violation until 2005 – two years after the alleged violation.[7] JA 1942-43, 2274-75.

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7. The District Court found this to be compelling evidence of pretext. Pet. App. at 92a-93a.

REASONS FOR DENYING THE PETITION

I. The Fourth Circuit's Decision Does Not Directly Conflict with Settled Precedent in Nine Other Circuits.

A. The Fourth Circuit Did Not Reject the Retaliation Standard Adopted by Other Circuits.

In support of its argument that the Fourth Circuit rejected the retaliation standard adopted by other circuits, petitioner principally relies on a case from the Eleventh Circuit, *Strickland v. Water Works & Sewer Board*, 239 F.3d 1199, 1207 (11th Cir. 2001). Petitioner argues that pursuant to *Strickland*, for Dotson to establish unlawful retaliation under the FMLA, he must show that petitioner had notice that he was specifically invoking the FMLA as a right. Through selective quoting of the Fourth Circuit's opinion and a misguided interpretation of *Strickland*, petitioner is attempting to manufacture a circuit split where none actually exists. Contrary to Petitioner's assertion, the Fourth Circuit did not recognize an actual conflict with *Strickland*, but rather stated that "***[t]o the extent*** that *Strickland* stands for a higher retaliation burden, we decline to follow it." Appendix to Cert. Pet. ("Pet. App.") at 15a. In other words, the Court did not depart from *Strickland*, but merely held that if Pfizer's reading of the case were correct (which it is not), it would not follow such interpretation. *See id.*

Although artfully worded, the issues presented by petitioner reduce to a single argument that petitioner

has advanced throughout this litigation. Namely, that an employer cannot be held liable for retaliation under the FMLA unless the employee has spoken certain magic words that specifically and unequivocally invoke the rights protected by the FMLA. Cert. Pet. at 3-4, 14-18; Petitioner's Appellate Brief at 31-38. The Court of Appeals correctly rejected this argument based on both the Federal regulations governing the FMLA and well-settled case law.[8] Pet. App. at 13a-16a.

In reality, the standard adopted by the Fourth Circuit for FMLA retaliation claims (and applied in this case) is entirely consistent with the standards applied in other Circuits. The Fourth Circuit, like the Eleventh

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8. The Fourth Circuit clearly understands that the "employer's knowledge that the plaintiff engaged in a protected activity is part of the third element of the *prima facie* case." *Dowe v. Total Action Against Poverty in Roanoke Valley*, 145 F.3d 653, 657 (4th Cir. 1998). In *Wright v. Southwest Airlines*, 319 Fed. Appx. 232 (4th Cir. 2009), a case decided roughly at the same time as *Dotson v. Pfizer, Inc.*, the Court of Appeals affirmed the entry of summary judgment in favor of a defendant-employer on the plaintiff's FMLA claim where the only protected activity was a request for FMLA leave. However, the plaintiff in *Wright* never took the requested leave and both her request and her need for leave were not known to the decision makers who decided to terminate her employment until after she had been discharged. *See id.*; *see also Wright v. Southwest Airlines*, No. CCB-06-3020, 2008 U.S. Dist. LEXIS 66659, at **5-6, 15-17 (D. Md. Aug. 21, 2008). Therefore, the decision to terminate Wright could not have been based on any protected activity. In contrast, petitioner's decision makers knew that Dotson had taken an adoption-related (and therefore FMLA-protected) leave and, based on substantial evidence of pretext, terminated his employment ***for that reason***.

Circuit in *Strickland*, applied the burden-shifting framework established by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), for evaluating Title VII discrimination claims. *See Yashenko v. Harrah's NC Casino Co., LLC*, 446 F.3d 541, 550 (4th Cir. 2006)); *see also Nichols v. Ashland Hosp. Corp.*, 251 F.3d 496, 502 (4th Cir. 2001). Under this framework, the Fourth Circuit concluded that Dotson gave petitioner adequate notice of his need for leave during the adoption process, prior to taking FMLA-protected leave, and that the jury's finding of unlawful discrimination was supported by the evidence at trial.[9] *See* Pet. App. at 14a-23a.

Specifically, the Fourth Circuit properly recognized that employees do not need to explicitly invoke the FMLA in order to benefit from its protections. Pet. App. at 14a. It is axiomatic that an employee need not expressly assert rights under the FMLA or even mention the FMLA to enjoy its protections. *See* 29 C.F.R. §§ 302(c), 303(b); *Babcock v. Bellsouth Adver. & Publ'g Corp.*, 348 F.3d 73, 78 n.5 (4th Cir. 2003). The employee need only provide sufficient information to reasonably apprise the employer that leave is needed for a protected reason but "need not use any magic words." *Sarnowski v. Air Brooke Limousine, Inc.*, 510 F.3d 398, 402 (3d Cir. 2007); *Brenneman v. MedCentral Health Sys.*, 366 F.3d 412, 421 (6th Cir. 2004); *see also* 29 U.S.C.

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9. As noted by the Fourth Circuit, on appeal, petitioner did not challenge the district court's finding that Dotson made out a *prima facie* case of retaliation based upon the timing of his firing under *Williams v. Cerberonics, Inc.*, 871 F.2d 452, 457 (4th Cir. 1989). Pet. App. at 16a n.5.

§ 2612(e)(1) and 29 C.F.R. § 825.302(c) ("the employee need not expressly assert rights under the FMLA, but may only state that leave is needed for an expected birth or adoption"); 29 C.F.R. § 825.303(b) ("the employee need not expressly assert rights under the FMLA or even mention the FMLA").

It is the employer's responsibility to determine whether a leave request is covered by the Act. *Bachelder v. Am. West Airlines, Inc.*, 259 F.3d 1112, 1131 (9th Cir. 2001). *See also Spangler v. Fed. Home Loan Bank of Des Moines*, 278 F.3d 847, 851-53 (8th 2002); *Price v. City of Fort Wayne*, 117 F.3d 1022, 1025-26 (7th Cir. 1997). Once the employee makes a disclosure of information suggesting leave is protected, the employer is "expected to obtain any additional required information through informal means," 29 C.F.R. § 825.303(b), and to notify the employee. 29 C.F.R. § 825.301(c). This regulatory scheme places the compliance burden on employers with minimal action required from employees.

The evidence at trial showed that petitioner had notice of Dotson's intent to take protected leave. Dotson kept petitioner informed of his need for leave throughout the adoption process. JA 974-75, 981-93. Dotson discussed his adoption plans with Kennedy, Burnell, petitioner's third-party benefits administrator, and others. JA 974-75, 981-83, 1049-51, 2801-02. In fact, Dotson even asked Kennedy, his direct supervisor, for help with the adoption process. JA 977-78. Any suggestion by petitioner that it lacked sufficient knowledge to designate Dotson's leave as FMLA-protected because he contacted Burnell instead of some other HR manager is incredible. Not only did Dotson

not have to comply with petitioner's internal procedures to qualify for FMLA leave, *See* 29 C.F.R. § 825.302(d), there is simply no legitimate basis to argue that Dotson's decision to call an HR manager based in the Mid-Atlantic Region provided any less notice to petitioner than had he called an HR manager in the Southeast Region.

Petitioner's argument that Dotson failed to adequately notify it of his eligibility or interest in FMLA leave cannot be supported by Dotson's failure to seek unpaid leave. *See Price*, 117 F.3d at 1026 ("***in all circumstances***, it is the employer's responsibility to designate leave.") (emphasis added); *see also* 29 C.F.R. § 825.208(a) ("in all circumstances, it is the employer's responsibility to designate leave, ***paid or unpaid***, as FMLA-qualifying, and to give notice of the designation to the employee") (emphasis added). Likewise, the fact that Dotson was required to use banked or paid vacation time to complete the adoption process is immaterial. It does not excuse petitioner's failure to properly classify Dotson's adoption-related leave as protected or its failure to refrain from punishing him on account of his leave.

Petitioner is liable for retaliation in violation of the FMLA despite its seemingly intentional ignorance of Dotson's protected status. Petitioner's liability simply does not turn on its subjective belief about whether Dotson's leave was protected by the FMLA. *See Bachelder*, 259 F.3d at 1130. It is the absence from work (and work requirements) that is protected by the FMLA and not merely the invocation of FMLA rights by the employee. Petitioner's reliance on *Strickland* to support its argument is misplaced. *Strickland* stands for the

narrow rule that where "an employee completely fails to give notice that she is absent for a potentially FMLA-qualifying reason . . . the absence is not protected by the Act." *See Bachelder*, 259 F.3d at 1130-31, n.20 (properly interpreting *Strickland*); *cf. Collins v. NTN-Bower Corp.*, 272 F.3d 1006 (7th Cir. 2001); *Peeples v. Coastal Office Prods.*, 203 F. Supp. 2d 432 (D. Md. 2002), *aff'd*, 64 Fed. Appx. 860 (4th Cir. 2003); *Spangler*, 278 F.3d at 851-53; *Price*, 117 F.3d at 1025-26.

This is not a case where the Fourth Circuit made erroneous factual findings or misapplied a properly stated rule of law. It is undisputed that Dotson repeatedly gave petitioner clear, advance notice that he would be absent from work to adopt his daughter, which is an FMLA-qualifying reason; that petitioner was on notice that he was inquiring about his FMLA options; and that petitioner did not fulfill its duty to classify Dotson's leave as FMLA-protected. As properly recognized by the Fourth Circuit, "even if we accepted the higher standard for a retaliation claim implied in *Strickland*, we would still find that Dotson presented sufficient evidence for a reasonable jury to believe that he was improperly prevented from invoking his FMLA rights and fired in retaliation for actions that should have been protected under the statute." Pet. App. at 15a.

Any suggestion in *Strickland* that an employee must recite the FMLA to engage in protected activity is contrary to the FMLA and its applicable regulations. *See Babcock*, 348 F.3d at 78 n.5; *Spangler*, 278 F.3d at 851-53; *Price*, 117 F.3d at 1025-26; *see also* 29 C.F.R. § 825.208(a). As the Fourth Circuit correctly observed, "any such elevated evidentiary burden contrasts with

the applicable FMLA notice regulations, which do not differentiate between the notice to make interference claims and other claims under the FMLA." Pet. App. at 15a. Petitioner's interpretation of *Strickland* turns this scheme on its head and frees employers from compliance in the absence of certain "magic words" explicitly invoking the FMLA. Indeed, the Fourth Circuit properly concluded that if petitioner's interpretation of the FMLA were correct, it could completely avoid the requirements of the FMLA by remaining willfully ignorant to the needs of its employees. *Id.* at 11 ("Pfizer's legal argument would allow it to use its own failure to determine whether leave should be designated as FMLA-protected to block liability for retaliation.").

B. The Intermittent Nature of Dotson's Absences Does Not Show that Petitioner Lacked Knowledge of Dotson's Adoption-Related Leave or that the Fourth Circuit Failed to Focus on Intent.

Petitioner seems to argue that it could not have assumed that Dotson's adoption-related absences were FMLA-protected because he never agreed to the use of FMLA leave on an intermittent basis. Cert. Pet. at 21-22, 25-26 ("even if all the decision makers were experts . . . they could not have assumed that Dotson intended to exercise FMLA rights because such a result could not be forced upon Dotson if he did not agree with such a designation").

For the same reasons discussed above, petitioner's argument fails because Dotson is not required to specifically invoke the FMLA's protections in order to

benefit from the Act. The regulations interpreting the FMLA repeatedly emphasize that it is the employer's responsibility to determine the FMLA's applicability. *Price*, 117 F.3d at 1026 (citing 29 C.F.R. § 825.303(b)). As recognized by the Fourth Circuit, when "read in context, subsection (b)(1) to § 2612 does not create an additional hurdle for employees asking for adoption-related leave beyond the requirement that they make a request or requests for leave that is intermittent" and "does not clash with the generally-accepted position that no 'magic words' are necessary to invoke the protections of the FMLA." Pet. App. at 10a.

The requirement that an employer and employee "agree" on intermittent leave means that employers can refuse to allow this type of leave in certain adoption placement cases.[10] However, this case is entirely different from cases allowing employers a defense under § 2612 (b)(1) where the employer expressly refused to agree to intermittent leave. *See* Pet. App. at 11a (distinguishing cases). Indeed, petitioner admitted in

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10. Though not necessary to the determination of this case, it is clear that the plain language of the FMLA only requires such an agreement when the leave is taken ***after the placement*** of an adoptive child is completed. Compare 29 U.S.C. § 2612(a)(1)(B) (requiring consent only when intermittent leave is taken "***[b]ecause of the placement*** of a[n adoptive] son or daughter") with 29 C.F.R. § 825.112(a)(2) (requiring employers "to grant [intermittent leave] ***before the actual placement*** or adoption of a child if an absence from work is required for the placement . . . to proceed"). Congress' use of the phrase "because of" creates a clear temporal boundary on the need for consent. Put simply, an employee cannot take leave "[b]ecause of the placement" until the placement actually occurs.

its brief to the Fourth Circuit that "Dotson was allowed to take all the leave he requested." Petitioner's Appellate Brief at 46. Moreover, the record reflects that Dotson kept his supervisors informed about his need for adoption-related absences and was improperly dissuaded from formally pursuing his FMLA options. Pet. App. at 11a-12a. Based upon the evidence of record, petitioner's own admissions, and applicable law, the Fourth Circuit correctly determined that Dotson requested FMLA qualifying leave and that petitioner agreed Dotson could take such leave intermittently. Petitioner cannot now claim that it lacked knowledge that Dotson's leave was protected by the FMLA because the intermittent nature of the leave was not "agreed to" by Dotson.

II. The Fourth Circuit's Decision Does not Eliminate Intent from Retaliation Claims or Transform Dotson's Claim Into One of Negligent Discharge Because Dotson Proved that Petitioner's Decision Makers Knew of His Protected Status and Intentionally Retaliated Against Him for FMLA-Protected Activity.

This is not a case of negligent discharge. Nor does the Fourth Circuit's decision read intent out of FMLA retaliation claims. To the contrary, Dotson presented sufficient evidence to the jury to demonstrate discriminatory animus among petitioner's decision makers. In fact, petitioner conceded on appeal that Kennedy not only had proven animus against Dotson, but also that the jury concluded Dotson's adoption-related absences were a motivating factor in the consensus group's decision. Petitioner's Appellate Brief at 24-25.

Nevertheless, petitioner contends that the consensus group could not have harbored the requisite animus because Kennedy was not a member of the group and, as the decision maker, the group did not know of plaintiff's protected status. Petitioner's argument fails because the evidence submitted to the jury showed that both Kennedy and McElerney harbored animus toward Dotson as a result of his adoption related leave,[11] that Kennedy and McElerney acted in concert,[12] and that McElerney was a member of the consensus group that made the decision to terminate

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11. For example, as noted by the Fourth Circuit, McElerney clearly expressed his frustration with Dotson for missing a deadline due to his adoption-related trip to Russia. Pet. App. at 17a, n.6. McElerney also testified that he viewed Dotson's adoption-related absences, including those taken before his trips to Russia, as inconvenient and problematic, JA 2227-28; openly complained that Dotson failed to meet deadlines but admitted that Dotson was late only in submitting a single report, JA 2230; required Dotson to classify his leave as unprotected vacation and pressured Dotson to continue working to meet deadlines on what should have been protected leave, JA 1047, 1110-11.

12. For example, evidence showed that McElerney manufactured evidence in an effort to support Kennedy's version of events. *Compare* JA 2654-55 (email from Kennedy to McElerney and produced by McElerney that states: "Lastly, there is something in regards to samples that we should discuss"), *with* JA 2719-20 (otherwise identical email produced by Kennedy which contains no such statement which suggests that McElerney added the missing sentence after its receipt). Evidence was also presented that McElerney conspired with Kennedy to set up Dotson for the alleged policy violation that petitioner ultimately relied upon to terminate him. *See infra* pp. 30-31.

Dotson. In short, there was sufficient evidence to raise an inference that McElerney, as a member of the consensus group, was principally responsible for Dotson's termination.[13]

In *Reeves v. Sanderson Plumbing Products, Inc.*, 520 U.S. 133 (2000), this Court evaluated an employer's liability for the discriminatory motivation of a supervisory employee in the context of a disparate treatment claim. 530 U.S. at 140. Although there was no direct or circumstantial evidence that the employer's formal decision makers harbored discriminatory motivation, this Court held that the employer was not entitled to judgment as a matter of law under the *McDonnell Douglas* framework because petitioner introduced evidence that one of petitioner's superiors in the chain of authority "was motivated by age-based animus and was principally responsible for petitioner's firing." *Id.* at 151. *Reeves* stands for the principle that the person acting with discriminatory animus need not be the formal decision maker to impose liability upon

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13. In fact, Dotson presented evidence that the consensus group principally relied on information from McElerney and Kennedy in reaching the decision to terminate him. JA 968, 1048, 1082, 1124, 1135-42, 1194-97, 1385, 2075-87, 2090-93, 2097, 2099-2102, 2114-19, 2140-44, 2151-54, 2163-67, 2316-17, 2328-30, 2373-74, 2401-02, 2425, 2628-29, 2647, 2649-51, 2653-55, 2714-15, 2721-22, 2729-36, 2760-64, 2801-02, 2907-11. Although not addressed by petitioner, there was also sufficient evidence to show that the consensus group was a "cat's paw" for Kennedy and that Kennedy's animus was the motivation for the decision maker's actions. *Shager v. Upjohn Co.*, 913 F.2d 398 (7th Cir. 1990); *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 290 (4th Cir. 2004).

an employer for adverse employment action, "so long as the plaintiff presents sufficient evidence to establish that the subordinate was the one 'principally responsible' for, or the 'actual decisionmaker' behind, the action." *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 288-89 (4th Cir. 2004) (citing *Reeves*, 530 U.S. at 151-52).

Similarly, in *Tuck v. Henkel Corporation*, 973 F.3d 371 (4th Cir. 1992), *abrogated on other grounds by O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996), the Fourth Circuit denied summary judgment where plaintiff showed that his former supervisor was biased and influenced the employer's decision to fire him. 973 F.3d at 376-77. Even though the former supervisor did not make the ultimate termination decision, he spoke negatively about plaintiff to decision makers, gave negative evaluations, and stood to gain from plaintiff's discharge. *Id.* at 377. In *Tuck*, the Fourth Circuit held that the extent of the supervisor's influence over the decision to terminate plaintiff was a question for the jury. *See id.* Similarly, Kennedy's and McElerney's influence over the decision to terminate Dotson was a question of fact left for the jury. Based on substantial evidence, the jury resolved the question in favor of Dotson and against petitioner. At bottom, this case does not present an appropriate question of law for consideration by this Court.

III. Evidence of Pretext Supports the Fourth Circuit's Decision.

Despite petitioner's arguments to the contrary, there was substantial evidence showing that Dotson's alleged policy violation was a mere pretext for discrimination.[14] First, petitioner's starter policies do not prohibit NHO personnel from possessing or distributing starters. JA 1842-43, 2912-71. Petitioner's own witnesses either professed ignorance of such a policy, JA 1415-17, 1451-53, 1458-59, 1497, 1507, 1539-40, 1802-05, 1809-10, or admitted that there was no such written policy, JA 1842-43. Even the NHO area manager testified that he had "no idea what [Petitioner's] policy would be" regarding Dotson's receipt of starters while employed within NHO. JA 2479. Moreover, petitioner never trained Dotson on any such policy. JA 947-48, 1842-43, 2103, 2105.

Petitioner, however, claimed that Dotson just should have known better,[15] JA 2119, 2122-23, but failed to

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14. As the District Court noted, to prove pretext Dotson had to demonstrate "weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's . . . reasons for its action." Pet. App. at 88a. Dotson offered such evidence in abundance.

15. Petitioner's repeated careless handling of its starter program also provided evidence of pretext and undermined any chance Dotson might have had to learn of any supposed unwritten policy against NHO personnel handling starters. Although petitioner has insisted that NHO employees do not have starter-tracking software on their company issued computers, Dotson did have starter-tracking software on his (Cont'd)

explain why none of its employees who knew of Dotson's planned donation took any action to stop him or raised any warning before he left for Russia. Indeed, Dotson informed Kennedy and other employees of his plan to take starters to the orphanage at least ten days before his first trip to Russia, yet no one warned either Dotson or petitioner about the imminent violation. JA 1020, 1022-24, 1032-34, 1411-17, 1458-59, 1626-27, 1808-10. Moreover, if Dotson's starter activity was a policy violation, petitioner never explained its complete failure to hold any other employees accountable for committing admitted policy violations.

Petitioner's incredible mischaracterization of Dotson's starter activity as giving the appearance of a *quid pro quo* is also proof that its stated reason for terminating Dotson is a *post hoc* justification for its violation of the FMLA. Petitioner has explicitly – and repeatedly – characterized Dotson's actions in giving Zithromax starters to the orphanage as ***a donation or***

(Cont'd)

computer. JA 1027-30, 1271-72. Petitioner also may insist that its NHO personnel do not receive starters directly from the warehouse; however, Dotson received seventeen cases of Viagra directly from petitioner after he was assigned to NHO. JA 948-51, 1348-49, 2674-75, 2759. Moreover, petitioner paid Dotson to maintain a starter storage unit well into his NHO tenure. JA 1115-16, 1348-49. A reasonable jury could certainly conclude from this overwhelming evidence that petitioner had no ban on NHO employees handling starters, that it never enforced any such ban even if it did have one, and that petitioner's reasons for terminating Dotson were pretextual. Certainly, petitioner's refusal to explore, understand, or consider such powerful mitigating circumstances strongly underscores the pretextual nature of its asserted reason for terminating Dotson.

gift. Cert. Pet. at 7; Petitioner's Appellate Brief at 11, 19; JA 3044, 3047. *Quid pro quo* means "something for something." *Black's Law Dictionary* 1261 (7th ed. 1999). Donations and gifts, by their very nature, are given with no expectation of receiving anything in return.

Indeed, no member of the consensus group was able to articulate how Dotson's conduct might give an appearance of a bribe. JA 2093-97, 2317-19, 2374-76. In fact, the Zithromax donation had no capacity to influence the decision to give Dotson custody. The decision was made by a Russian judge hundreds of miles away from the orphanage. JA 1010, 1014, 1368, 1370.

Furthermore, Dotson's evidence of McElerney's and Kennedy's misconduct supported – at the very least – a reasonable inference of illegal motivation. Particularly significant was McElerney's testimony that Kennedy told him about Dotson's plan to take starters to the Russian orphanage before attending a conference in Florida with Dotson. Despite this knowledge, McElerney never sought Dotson out at the conference to intercede or admonish Dotson that he would violate policy if he went forward with his plan to take starters to Russia.[16] This evidence supports two alternate – and equally damning – inferences. The first is that McElerney did not perceive Dotson's plan as a policy violation. As a consensus group member, McElerney's failure to perceive a problem raises a reasonable inference that there was no violation and there was instead a discriminatory motive behind the decision to terminate Dotson.

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16. McElerney, Kennedy and Dotson were together at the conference in Orlando for almost two full days and saw each other regularly. JA 1033-34, 2224-26, 2231-32.

A second reasonable inference from this evidence is that McElerney and Kennedy did perceive an imminent violation and saw it as a perfect opportunity to set Dotson up for termination because of their outright hostility and irritation toward Dotson's adoption-related absences. JA 1683-84, 2652, 2716, 2721-22. Chronologically, this makes perfect sense because, although they knew of Dotson's plans before he left for Russia, neither McElerney nor Kennedy raised any concerns about a starter policy violation until after Dotson had left. A rational jury could reasonably conclude that McElerney and Kennedy did not report the violation before Dotson's departure to ensure that Dotson could not avoid violating policy or save his job.[17]

Dotson's evidence also established that petitioner treated similarly situated employees who did not take FMLA leave more favorably than it treated Dotson, which is further evidence of pretext. *See Cline v. Wal-Mart Stores, Inc.*, 144 F.3d 294, 302 (4th Cir. 1994) (an employer's favorable treatment of similarly situated employees who did not engage in FMLA-protected activity shows pretext). Dotson received starters from both Jones and Stalker. However, neither Jones nor

17. According to Harper and petitioner's other witnesses, had Kennedy or McElerney taken steps to stop Dotson before his trip (such as reporting Dotson to Starter Administration), Dotson would not have been terminated for merely possessing starters. JA 2374. Harper also acknowledged that by failing to report Dotson's planned conduct before the trip to Russia, both McElerney and Kennedy contributed to the appearance of the *quid pro quo*. JA 2386. As noted before, neither McElerney nor Kennedy were disciplined for contributing to the appearance of the *quid pro quo*.

Stalker had taken FMLA leave and neither was disciplined for providing starters to Dotson. JA 1497, 1507, 1890-91, 2109-14. Likewise, neither McElerney nor Kennedy took FMLA leave and neither was disciplined for failing to prevent Dotson from donating starters, which failure was itself a policy violation.[18] JA 2386. If motive and intent are irrelevant with respect to policy violations,[19] then certainly McElerney, Kennedy, Jones, and Stalker, should have been disciplined for their own violations of starter policy.

Finally, Petitioner's stated reason for terminating Dotson is itself evidence of pretext. Petitioner informed Dotson that he was being fired because his conduct "put Pfizer at risk" of violating the PDMA. JA 1123-27, 1130-32, 2132, 2739, 2743. Nevertheless, petitioner instructed Dotson not to retrieve the starters from Russia and did not report to the FDA policy violations by Dotson, McElerney, Kennedy, Stalker, and Jones until nearly two years after the alleged violations. Petitioner's own policy expressly states that any starter violations should have been reported to the FDA within five days. JA 2656-59. If Petitioner truly thought that Dotson "put Pfizer at

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18. Petitioner has said that Kennedy (and presumably McElerney) had no obligation to enforce petitioner's starter policies. JA 3040, n.5. This is patently false. Petitioner's Compliance Policy states that employees who "become aware of or reasonably believe that there has been a potential or actual violation of the law, regulation or company policy or procedures," have an affirmative "obligation to report [the violation]." JA 2707.

19. *See, e.g.*, JA 2743, in which Hodges states that motive and intent are irrelevant.

risk" by creating the appearance of a *quid pro quo*, it is reasonable to expect that petitioner would have timely reported everyone to the FDA who participated in or contributed to the violation.[20] Indeed, despite Harper's testimony that Kennedy and McElerney also contributed to the appearance of a *quid pro quo*, there is no evidence that their conduct has been reported to the FDA.

For these reasons, Dotson's evidence demonstrated an abundance of "weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions" from which a reasonable jury could conclude that petitioner's shifting excuses for terminating Dotson were a pretext for the real reason it discharged him, i.e. his adoption-related absences. Based upon clear evidence of both animus and pretext, Fourth Circuit properly affirmed the District Court's denial of petitioner's JMOL motions on Dotson's retaliation claim. Therefore, petitioner's request for a writ of certiorari should be denied.

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20. Despite petitioner's excuses, if petitioner actually believed Dotson had created the appearance of a *quid pro quo* at the time, it should have reported the violation immediately. This Court need only compare petitioner's letter to the FDA with its current explanation for Dotson's termination to infer that petitioner's *quid pro quo* argument is a mere afterthought. JA 2774-75. It was not unreasonable for the jury to infer the same.

CONCLUSION

Respondent James D. Dotson respectfully requests that the Court deny petitioner's request for a writ of certiorari.

Respectfully submitted,

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RESIDENCE/ADV IF HE NEEDS IT FOR COURT, HE WLD NEED TO GO THRU THE
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PLAINTIFF'S EXHIBIT
CASE NO. 5:04-CV-722-BR(3)
EXHIBIT NO. 140

Progress Energy

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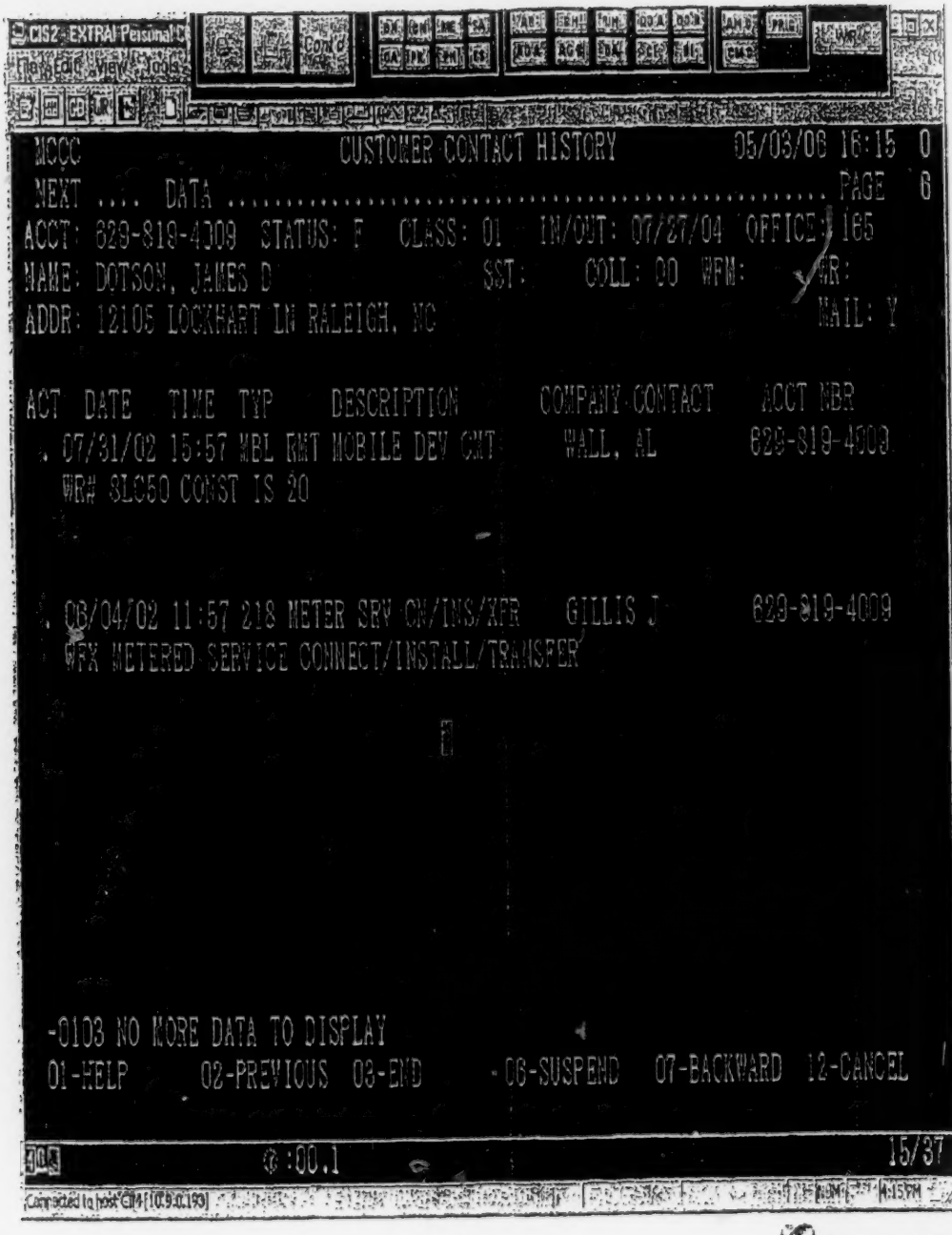
BEFORE:
AFTER : MRS ANN L DOTSON
09/29/03 16:31 BLI BILL INQUIRY SKURKY A W 629-819-4009
CST CALLED TO VERIFY HIS OUTAGE INFO FOR THE STORM (ISABEL) - NEEDED
RESTORATION TIMES FOR HIS INSURANCE COMPANY
01-HELP 02-PREVIOUS 03-END 06-SUSPEND 07-BACKWARD 08-FORWARD
12-CANCEL
17/33
Connected to host CMF (10.9.0.193)

Progress Energy

CIS2 - EXTRA! Personal C
File Edit View Tools
MCCC CUSTOMER CONTACT HISTORY 05/03/06 16:15 0
NEXT .... DATA ..... PAGE 5
ACCT: 629-819-4009 STATUS: F CLASS: 01 IN/OUT: 07/27/04 OFFICE: 165
NAME: DOTSON, JAMES D SST: COLL: 00 NEW: MR:
ADDR: 12105 LOCKHART LN RALEIGH, NC MAIL: Y
ACT DATE TIME TYP DESCRIPTION COMPANY CONTACT ACCT NBR
12/11/02 20:56 117 NAME/ADDR/PH# CHANGE DR20718 629-819-4009
PHONE NUMBER CHANGED VIA TWENTY FIRST CENTURY UPDATE FILE
FROM 9199661721 TO 9198661721
10/30/02 11:35 NBL RMT MOBILE DEV CMT WALL, AL 629-819-4009
WRM 75FHH CONST ON METER IS CORRECT 40. CIMS SHOWS 20- EST AS NEC
10/15/02 14:31 COR CORRESPONDENCE AYERS L R 629-819-4009
INCOR MULT 155 10/15/2002 JAMES D DOTSON 12105 LOCKHART LN RALEIGH NC
276148006 6298194009 MR DOTSON CREDIT 403.56 FR 06/26/2002 TO 09/25/20
02
01-HELP 02-PREVIOUS 03-END 06-SUSPEND 07-BACKWARD 08-FORWARD
12-CANCEL
00:01
08/03
Connected to host CIM (10.9.0.193)
NUM
3:15 PM

Progress Energy


CICS/ESA EXTRA! Personal C
File Edit View Tools
MCCC CUSTOMER CONTACT HISTORY 05/03/06 16:15 0
NEXT .... DATA ..... PAGE 6
ACCT: 629-819-4009 STATUS: F CLASS: 01 IN/OUT: 07/27/04 OFFICE: 165
NAME: DOTSON, JAMES D SST: COLL: 00 WFM: WR:
ADDR: 12105 LOCKHART LN RALEIGH, NC MAIL: Y
ACT DATE TIME TYP DESCRIPTION COMPANY CONTACT ACCT NBR
07/31/02 15:57 MBL RMT MOBILE DEV CNT WALL, AL 629-819-4009
WR# SL050 CONST IS 20
08/04/02 11:57 218 METER SRV CH/INS/XFR GILLIS J 629-819-4009
WFX METERED SERVICE CONNECT/INSTALL/TRANSFER
-0103 NO MORE DATA TO DISPLAY
01-HELP 02-PREVIOUS 03-END 06-SUSPEND 07-BACKWARD 12-CANCEL
@:00.1
15/37
Connected to host CIM (10.9.0.193)
4:15 PM

Progress Energy